9

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 62.

GEORGE DICK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

FILED JULY 6, 1906.

(20,303.)

(20,303.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 338.

GEORGE DICK, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

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1 *Indictment.*

In the District Court of the United States within and for the District of Idaho, May Term, 1905.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Indictment. Violation Sec. 2139, R. S., as Amended, 29 Stat., p. 506. Introducing Liquor on Indian Reservation.

George Dick is accused by the grand jurors of the United States of America, within and for the district of Idaho, having been duly summoned, empannelled, and sworn in the name and by the authority of the United States of America, upon their oaths, by this indictment, of the crime of introducing intoxicating liquors into the Indian country, committed as follows, to wit:

That the said George Dick, at the county of Nez Perces, within the district of Idaho, and within the jurisdiction of this court, on the 15th day of March, 1905, then and there being, did then and there unlawfully and feloniously introduce intoxicating liquors, to wit, one pint of whiskey (a more particular description of which intoxicating liquor is to the grand jurors unknown) into the Indian country, to wit, into and upon the Nez Percé Indian Reservation in the said county of Nez Perces, against the peace and dignity of the United States, and contrary to the form, force, and effect of the statute in such cases made and provided.

N. M. RUICK,
United States District Attorney, District of Idaho.

A. O. CHRISTENSON,
Foreman of the Grand Jury.

2 Names of witnesses examined before the United States grand jury upon finding the foregoing indictment. Te-we-talkt, F. G. Mattoon, Wates-la-om-neen, Johnie-Go-hoy-uit.

(Endorsed:) No. 565. In the District Court of the United States within and for the District of Idaho. The United States of America *vs.* George Dick. Indictment. Violation Sec. 2139, R. S., as amended, 29 Stat., p. 506. Presented by the foreman in the presence of the grand jury and filed in open court this 10th day of May, 1905. A. L. Richardson, clerk. A. O. Christenson, foreman grand jury.

Demurrer.

In the District Court of the United States within and for the District of Idaho.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Demurrer.

Comes now the said defendant and demurs to the indictment on file herein and for cause and grounds of demurrer alleges and shows to the court:

First. That the grand jury returning said indictment had no legal authority to inquire into the offense charged, by reason of it not being within the legal jurisdiction of this court, in this, that it appears from said complaint:

a. That at the time charged in the said indictment there was no Indian country within the said county of Nez Perces or within the jurisdiction of this court, namely, within the district of Idaho, known or designated as "The Nez Perce Indian Reservation." That the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as "The Nez Perce Indian Reservation" was, by the act of the Congress of the United States admitting Idaho as a State into the Union, relinquished to the State of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the lands included within the boundary of such reservation should be extinguished. That the Indian or tribal title to the lands therein contained has, since the admission of the said State, been extinguished by allotment of the said lands in severalty to the individual Indians and by the purchase of the balance thereof by the United States, and that said allotments and the said purchase have been ratified by the public laws and acts of the Congress of the United States; and further, that the said former reservation known and designated as the Nez Perce Indian Reservation had, prior to the time of the commission of the acts mentioned in said indictment, been opened for occupation, settlement, and disposal under the general land laws of the United States by an act of Congress, and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in said indictment, settled and appropriated by citizens of the State. That various town sites within the boundaries of said former reservation had been settled by
3 citizens and that title thereto transferred from the United States to the inhabitants. Municipal governments, namely, villages, had been organized and were in existence within the said boundaries of said former reservation and that the same, nor any part thereof, is not, and was not, at the times mentioned in said indictment, Indian country, or lands reserved for the use and occupa-

tion of Indians or occupied by any Indian maintaining tribal relations or by any Indians or persons whomsoever over which the United States is exercising, or attempting to exercise, any of the authority or control in nature of the guardianship of the person.

Second. That said indictment does not substantially conform to the requirements of sections 7877 and 7879 of the revised statutes of Idaho in that the facts and acts constituting the offense charged are not stated so as to enable the defendant to know what is intended, and that the said indictment is uncertain, and its statement of particular circumstances of the offense charged for the reason that the words "Nez Perce Indian Reservation" is not the designation of any particular and definite territory such as to enable the defendant to determine whether or not the place attempted to be designated is within or upon lands or territories reserved by the Government of the United States for the use of Indians, or over which the Government has jurisdiction in its administration of Indian affairs, nor can the defendant determine whether or not the place to which it is charged that the defendant introduced the liquor was an Indian allotment, of which the title is held in trust by the Government.

Third. That the facts stated in said indictment do not constitute a public offense and particularly that the facts stated in said indictment are not sufficient to constitute any offense against the laws of the United States, nor any offense within the jurisdiction of this court.

Dated this 11th day of May, A. D. 1905.

FOGG & NUGENT,
Attorneys for Defendant, Residing at Lewiston, Idaho.

(Endorsed:) No. 565. In the District Court of the United States within and for the District of Idaho. The United States of America *vs.* George Dick. Demurrer. Filed May 11th, 1905. A. L. Richardson, clerk.

Defendant's Requests.

In the United States District Court for the District of Idaho.

UNITED STATES OF AMERICA
vs.
GEORGE DICK.

No. 1.

I instruct you, gentlemen, that notwithstanding you may find from the evidence that the defendant, George Dick, had intoxicating liquor in his possession within the Nez Perce Indian Reservation, or Indian country, still if you further find from the evidence in this case that the defendant did not introduce said liquor into the Nez Perce Indian Reservation, or Indian country, or upon an Indian allotment, then your verdict must be not guilty.

Refused.

4 No. 2.

And I further instruct you that unless you find from the evidence in the case that the defendant brought the said liquor from a point or place from without the limits of the Nez Perce Indian Reservation, or Indian country, into the boundaries of the said Indian reservation, or Indian country, then your verdict must be not guilty.

Refused.

No. 3.

I instruct you, gentlemen, to find the defendant, George Dick, not guilty.

Refused.

(Endorsed:) No. 565. U. S. District Court, District of Idaho. The United States *vs.* George Dick. Defendant's requests. Field May 15th, 1905. A. L. Richardson, clerk.

Verdict.

United States District Court, Northern Division, District of Idaho.

THE UNITED STATES
vs.
GEORGE DICK.

Verdict.

We, the jury in the above entitled cause, find the defendant guilty as charged in the indictment.

C. A. HAGEN, *Foreman.*

(Endorsed:) No. 565. U. S. District Court, Northern Division, District of Idaho. The United States *vs.* George Dick. Verdict. Filed May 15th, 1905. A. L. Richardson, clerk.

Motion in Arrest of Judgment.

In the District Court of the United States, in and for the District of Idaho.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Motion in Arrest of Judgment.

Comes now the defendant, George Dick, and moves the court that judgment be arrested and sentence be not passed in this action upon his conviction, upon verdict of the jury herein, for the reasons:

1st. That the indictment herein does not state facts sufficient to

constitute a public offense, nor does it state facts sufficient to constitute any offense or any violation of any laws of the United States.

2nd. That this court has not jurisdiction over the person of this defendant nor over the offense stated or attempted to be stated in the said indictment, for the reason that it does not appear from the said indictment that the place where the said offense charged to have been committed is within the jurisdiction of the United States; but, to the contrary, it affirmatively appears from said indictment that the place where said offense is alleged to have been committed is within the jurisdiction of the State of Idaho, and further, that the law under which this defendant was indicted and arraigned is unconstitutional and void, for the reason that the Congress of the United States had no power to pass a law providing for police regulations over the matters and things alleged in said indictment within the territory of the State of Idaho or over the place where said offense is said to have been committed.

Wherefore the defendant prays that judgment upon the said plea and conviction of "Guilty" be arrested and that he be discharged.

Dated this 13th day of May, A. D. 1905.

F. E. FOGG & G. W. TANNAHILL,
Attorneys for Defendant.

(Endorsed:) No. 565. In the District Court of the United States in and for the District of Idaho. The United States of America *vs.* George Dick. Motion in arrest of judgment. Filed May 16, 1905. A. L. Richardson, clerk.

Order Extending Time to Settle Bill of Exceptions.

In the District Court of the United States in and for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Order Extending Time to Settle Bill of Exceptions.

It appearing to the court that additional time is necessary for the defendant to prepare and present a bill of exceptions taken during the trial for settlement:

It is therefore ordered that the defendant's time for preparing, presenting, and serving upon the district attorney a bill of exceptions thereof upon the trial of the cause, including exceptions taken to the overruling of the demurrer and exceptions to the order of the court overruling and denying defendant's motion and arrest of judgment and all the exceptions taken upon the trial, and the admission and rejection of evidence, and to the instructions of the court, be extended for sixty days from the date of this order.

Done in open court this 16th day of May, A. D. 1905.

JAS. H BEATTY, *Judge.*

(Endorsed:) No. 565. In the District Court of the United States, District of Idaho, Northern Division. The United States of America *vs.* George Dick. Order extending time to settle bill of exceptions. Filed May 16, 1905. A. L. Richardson, clerk.

6 *Journal Entries.*

At a stated term of the District Court of the United States for the District of Idaho, Northern Division, held at Moscow, Idaho, on Wednesday the 10th day of May, 1905:

Present: Hon. Jas. H. Beatty, judge.

No. 565. Introducing Liquor.

THE UNITED STATES
vs.
GEORGE DICK.

On this day the defendant herein was brought into court to be arraigned upon the true bill of indictment heretofore presented against him by the grand jury. Being asked if George Dick was his true name, the defendant stated that it was. The formal reading of the indictment was waived and defendant furnished with a true copy thereof by order of court at the expense of the United States. Being asked for his plea, the defendant pleaded that he is not guilty of the offense charged in the indictment.

SATURDAY, *the 13th day of May*, 1905.

No. 565. Introducing Liquor.

THE UNITED STATES
vs.
GEORGE DICK.

On this day the court announced its decision upon the demurrer to the indictment herein, heretofore argued and submitted. Ordered that said demurrer be and the same is hereby overruled.

MONDAY, *the 15th day of May*, 1905.

No. 565. Introducing Liquor.

THE UNITED STATES
vs.
GEORGE DICK.

Now on this day this cause came on regularly to be heard and tried before the court and jury, N. M. Ruick, U. S. district attorney, appearing as counsel for the plaintiff, and F. E. Fogg and Geo. W. Tannahill, esqrs., on behalf of defendant, said defendant being in court in person. The clerk under direction of the court proceeded to draw

from the jury box the names of twelve persons, one at a time, to serve as a jury in said cause, and the following are the names of the persons drawn from the box, sworn on *voir dire*, passed upon, accepted by the counsel for the respective parties, and sworn by the clerk to well and truly try said cause and a true verdict render therein according to the law and the evidence, to wit: Warren P. Hunt, Jno. E. Randall, H. C. Grice, J. L. Miller, W. H. Simpson, Geo. Brewster, Frank Hart, Geo. P. Thompson, Jesse Reeves, C. A. Hagen, R. S. Mathews, & D. H. Robinson.

The clerk read the indictment to the jury and stated the defendant's plea. Ed. Raboin was sworn as interpreter.

The following named persons were sworn, examined, and cross-examined as witnesses on behalf of plaintiff, to wit: Te-we-talkt, through the interpreter, F. G. Matoon, John Dickson, through the interpreter, John-Yo-hoy-wit, through the interpreter, and Ed. Raboin, and the plaintiff rests.

7 George Dick was sworn and examined on his own behalf, and the defense rests and the evidence closed. The said cause was thereupon submitted without argument and said jury, after being instructed by the court, retired to their room to consider of their verdict in charge of an officer of the court duly qualified.

Now came the jury all called and found to be present the respective attorneys of record and the defendant in person being in court. Being asked if they had agreed upon a verdict they, through their foreman, presented their written verdict in the words following, to wit:

"United States District Court, Northern Division, District of Idaho.

"THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Verdict.

"We the jury in the above-entitled cause find the defendant guilty as charged in the indictment.

"C. A. HAGEN, *Foreman.*"

TUESDAY, *the 16th day of May*, 1905.

No. 565. Introducing Liquor.

THE UNITED STATES
vs.
GEORGE DICK.

Now came the defendant in person and by his counsel, F. E. Fogg, esqr., and thereupon the defendant's motion in arrest of judgment herein was submitted to the court, and upon consideration it is ordered that said motion be, and the same is hereby, denied,

to which ruling the said defendant by his said counsel then and there excepted in due form of law, and it is ordered that said defendant do pay a fine of $100.00 and costs, and that he be imprisoned in the penitentiary of the State of Idaho, at Boise, Idaho, for the term of one year and ten days.

It is further ordered that execution be stayed herein for a period of sixty days, or during the further order of the court or judge thereof upon the deposit with the clerk of $400.00 cash as security for defendant's appearance when ordered by the court or judge.

In the District Court of the United States for the Northern District of the District of Idaho, May Term, A. D. 1905.

No. 565. Convicted of Introducing Intoxicating Liquors into the Indian Country.

THE UNITED STATES
against
GEORGE DICK.

Present: Hon. Jas. H. Beatty, Judge.

Now, on this 16th day of May, 1905, the United States district attorney, with the defendant and his counsel, F. E. Fogg, esqr., came into court; the defendant was duly informed by the court of the nature of the indictment found against him for the crime of introducing intoxicating liquors into the Indian country committed on the 15th day of March, A. D. 1905, of his arraignment and
8 plea of "Not guilty as charged in said indictment," of his trial and the verdict of the jury on the 15th day of May, A. D. 1905, "Guilty as charged in the indictment." The defendant was then asked by the court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the court.

Now, therefore, the said defendant having been convicted of the crime of introducing intoxicating liquors into the Indian country

It is hereby considered and adjudged that the said defendant, George Dick, do pay a fine of one hundred (100) dollars, and the costs of this action taxed at one hundred eight and 40/100 dollars, and that he stand committed until said fine is paid.

And that he be imprisoned and kept in the penitentiary of the State of Idaho, at Boise, Idaho, for the term of one year and ten days; and it is further ordered and adjudged that said defendant be, and is hereby, remanded to the custody of the United States marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof.

(Endorsed:) In the District Court of the United States for the District of Idaho. Judgment roll No. 565. The United States *vs.* George Dick. Filed May 15th, 1905. A. L. Richardson, clerk.

Notice of Intention to Move for a New Trial.

In the District Court of the United States in and for the District of Idaho, Northern Division, May Term, 1905.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
GEORGE DICK, Defendant.

Notice of Intention to Move for a New Trial.

To the plaintiff above named and to N. M. Ruick, district attorney, and by virtue thereof attorney for plaintiff, and to each of you:

Take notice, that the defendant above named intends to and will move the above-entitled court to vacate and set aside the verdict rendered in the above-entitled cause, on the 15th day of May, A. D. 1905, and to grant a new trial of said cause upon the following grounds, to wit:

1.

Insufficiency of the evidence to justify the verdict and that the same is against law.

2.

Errors of law occuring at the trial and excepted to by the defendant.

3.

Errors of law occurring in the instructions of the court, wherein and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of
9 the issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

4.

Errors of law in overruling the defendant's demurrer to the indictment herein, and overruling the defendant's motion in arrest of judgment, and in sentencing the defendant upon the indictment and verdict returned and filed in said cause.

Said motion will be made and based upon a statement of the case to be hereafter prepared and served, settled and filed, upon the indictment heretofore filed herein, and upon the defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above entitled cause.

F. E. FOGG,
GEO. W. TANNAHILL,
Attorneys for Defendant, Residing at Lewiston, Idaho.

(Endorsed:) No. 565. In the District Court of the United States, Northern Division, District of Idaho. The United States of America, plaintiff, *vs.* George Dick, defendant. Notice of intention to move for a new trial. Filed May 24th, 1905. A. L. Richardson, clerk. By H. C. Shaver, deputy.

Motion for a New Trial.

In the District Court of the United States, in and for the District of Idaho, Northern Division, May Term, 1905.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
GEORGE DICK, Defendant.

Motion for a New Trial.

Comes now the defendant above named, pursuant to notice heretofore given, and moves the court that the verdict, rendered in the above-entitled cause on May 15, 1905, be set aside and vacated, and a new trial granted therein upon the following grounds:

1.

Insufficiency of the evidence to justify the verdict, and that the same is against law.

2.

Errors of law occurring at the trial and excepted to by the defendant.

3.

Errors of law occurring in the instructions of the court wherein and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of the issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

4.

10 Errors of law in overruling the defendant's demurrer to the indictment herein and in overruling defendant's motion in arrest of judgment and in sentencing the defendant upon the indictment and the verdict returned and filed in said cause.

This motion will be made and based upon a statement of the case to be hereafter prepared and served, the indictment heretofore filed herein, defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above-entitled cause.

F. E. FOGG AND
GEO. W. TANNAHILL,
Attorneys for Defendant, Residing at Lewiston, Idaho.

(Endorsed:) No. 565. In the District Court of the United States, in and for the District of Idaho, Northern Division. May term, 1905. The United States of America, plaintiff, *vs.* George Dick, defendant. Motion for a new trial. Filed May 24th, 1905. A. L. Richardson, clerk. By H. C. Shaver, deputy.

Bill of Exceptions.

In the United States District Court for the District of Idaho, Northern Division, May Term, 1905.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
GEORGE DICK, Defendant.

Bill of Exceptions and Statement of Case.

Be it remembered that upon the 10th day of May, 1905, the defendant was indicted by the grand jury in the above-entitled court, charged with violation of section 2139, R. S., U. S., amended by 29 Statute, page 506, which indictment is as follows:

"In the District Court of the United States, within and for the District of Idaho. May term, 1905. The United States of America *vs.* George Dick. Indictment. Violation sec. 2139, R. S., as amended 29 Stat., p. 506.

"George Dick is accused by the grand jurors of the United States of America, within and for the District of Idaho, having been duly summoned, empanelled and sworn in the name and by the authority of the United States of America, upon their oaths, by this indictment, of the crime of introducing intoxicating liquors into the Indian country, committed as follows, to wit:

"That the said George Dick at the county of Nez Perces, within the District of Idaho and within the jurisdiction of this court, on the 15th day of March, A. D. 1905, then and there being, did then and there unlawfully and feloniously introduce intoxicating liquors, to wit, one pint of whiskey (a more particular description of which intoxicating liquor is to the grand jurors unknown), into the Indian country, to wit, into and upon the Nez Perce Indian Reservation in the said county of Nez Perces; against the peace and dignity
11 of the United States and contrary to the form, force, and effect of the statute in such cases made and provided.

N. M. RUICK,
United States District Attorney, District of Idaho.

A. O. CHRISTENSON,
Foreman of the United States Grand Jury.

Names of witnesses examined before the United States grand jury upon finding the foregoing indictment: Te-we-Talkt, Watts-la-omneen, Johnie Yo-Gay-Nil, F. G. Matoon.

(Endorsed:) No. 565. Presented by the foreman in presence of the grand jury and filed in open court this 10th day of May, 1905. A. L. Richardson, clerk. A. O. Christenson, Foreman Grand Jury.

Be it further remembered that thereafter, on the 13th day of May, 1905, the defendant filed in said court his demurrer to said indictment, which demurrer is as follows:

"In the District Court of the United States within and for the District of Idaho. The United States of America *vs.* George Dick.

"Comes now the said defendant and demurr*ers* to the indictment on file herein and for cause and grounds of demurrer alleges and shows to the court:

"First. That the grand jury returning said indictment had no legal authority to inquire into the offense charged by reason of it not being within the legal jurisdiction of this court, in this, that it appears from said complainant:

"A. That at the time charged in the said indictment there was no Indian country within the said county of Nez Perces or within the jurisdiction of this court, namely, within the district of Idaho, known or designated as 'The Nez Perce Indian Reservation:' that the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as 'The Nez Perce Indian Reservation' was, by the act of Congress of the United States admitting Idaho as a State into the Union, relinquished to the State of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the land included within the boundaries of such reservation should be extinguished; that the Indian or tribal title to the lands therein contained has, since the admission of the said State, been extinguished by allotment of the said land in severalty to the individual Indians and by the purchase of the balance thereof by the United States and that said allotments and the said purchase have been ratified by the public laws and acts of the Congress of the United States, and, further, that the said former reservation known and designated as 'The Nez Perce Indian Reservation' had, prior to the time of the commission of the acts mentioned in said indictment, been open for occupation, settlement, and disposal under the general land laws of the United States by an act of Congress and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in said indictment, settled and appropriated by citizens of the State; that various town sites within the boundaries of said former reservation had been settled by citizens
12 and that title thereto transferred from the United States to the inhabitants. Municipal governments, namely, villages, had been organized and were in existence within the boundaries of said former reservation, and that the same, nor any part thereof, is not, and was not, at the times mentioned in said indictment, Indian country or lands reserved for the use and occupation of Indians, or occupied by any Indians maintaining tribal relations or by any Indians or persons whomsoever over which the United States is exercising, or attempting to exercise, and of the authority or control, in nature of the guardianship of the person.

"Second. That said indictment does not substantially conform to the requirements of sections 7677 and 7679 of the revised statutes of Idaho in that the facts and acts constituting the offense charged

are not stated so as to enable the defendant to know what is intended, and that the said indictment is uncertain in its statements of particular circumstances of the offense charged for the reason that the words 'Nez Perce Indian Reservation' *is* not the designation of any particular and definite territory such as to enable the defendant to determine whether or not the place attempted to be designated is within or upon lands or territories reserved by the Government of the United States for the use of Indians, or over which the Government has jurisdiction in its administration of Indian affairs, nor can the defendant determine whether or not the place to which it is charged that the defendant introduced the liquor was an Indian allotment, of which the title is held in trust by the Government.

"Third. That the facts stated in said indictment do not constitute a public offense and particularly that the facts stated in said indictment are not sufficient to constitute any offense against the laws of the United States, or any offense within the jurisdiction of this court.

"Dated this 11th day of May, A. D. 1905.

F. E. FOGG &
GEO. W. TANNAHILL,
Attorneys for Defendant, Residing at Lewiston, Idaho.

(Endorsed:) Filed May 13, 1905. A. L. Richardson, clerk.

Be it further remembered that thereafter said demurrer was duly argued and submitted to the court for decision and the court then and there, on the 13th day of May, 1905, overruled said demurrer and made and entered its order denying the same, which is as follows:

"In the United States District Court of the District of Idaho, Northern Division, May Term, 1905.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
GEORGE DICK, Defendant.

Order Overruling Demurrer.

"This cause came on to be heard this 13th day of May, 1905, at 3.00 o'clock p. m., upon the defendant's demurrer to the indictment herein, F. E. Fogg and Geo. W. Tannahill appearing for defendant in support of said demurrer and N. M. Ruick, district attorney, appearing in opposition thereto. After hearing arguments of respective counsel and being fully advised in the premises the court overruled said demurrer.

"Now, therefore, by reason of the law and the premises aforesaid the court orders that said demurrer be and the same hereby is overruled and it is so ordered, to which defendant excepted and exception allowed.

JAS. H. BEATTY,
District Judge."

(Endorsed:) Filed May 13th, 1905. A. L. Richardson, clerk.

13 Be it further remembered that the defendant, George Dick, then and there excepted to the ruling of the court in overruling said demurrer, which exception was at the time allowed.

Be it further remembered that thereafter and on the 15th day of May, 1905, and after the filing of said demurrer and the order overruling the same, the defendant, reserving his exceptions to said demurrer and to the jurisdiction of the court as argued in said demurrer, pleaded not guilty to the said charge in said indictment.

Be it further remembered that thereafter and on the 15th day of May, 1905, this cause came on regularly for trial upon said indictment and the defendant's plea of not guilty thereto, whereupon a jury was regularly sworn and empanelled to try said cause, N. M. Ruick, esqr., United States District Attorney, appearing for the prosecution, and F. E. Fogg and Geo. W. Tannahill, esqrs., appearing as attorneys for the said defendant.

Be it further remembered that thereupon the following proceedings, and none other, were had, and the following testimony and proof, and none other, was had upon the trial of said cause.

TE-WE-TALKT was called and sworn as a witness on behalf of the United States, and upon direct examination by the United States Attorney was asked the following question:

"You are a Nez Perce Indian, living on the Nez Perce Indian Reservation?"

Which question was then and there objected to by the counsel for the defendant, for the reason that the indictment does not state facts sufficient to constitute any public offense nor any offense against any law of the United States, and particularly that the said indictment does not allege that any liquor was introduced into the Indian country, or upon any Indian allotment from any place without such Indian country or without such Indian allotment; and further, that the facts stated in said indictment do not establish any violation of any law of the United States, and particularly do not establish a violation of section 2139 of the Revised Statutes, as amended by 29 Statute- at Large, page 506, and that the said statute, inasfar as it assumes to publish as an offense against the laws of the United States the bringing of liquor into any territory within the limits of this State not within the Indian country and not reserved by the Government for the exclusive use of the Indians is unconstitutional and void, and for the further reason that this court has no jurisdiction over the subject-matter of the offense charged or attempted to be alleged in the indictment, nor over the person of this defendant, for the reasons above stated.

Which objection was then and there overruled by the court, and the witness permitted to answer said question, to which ruling and decision of the court the defendant, by his counsel, then and there excepted, which exception was at the time allowed by the court.

Whereupon the witness, in answer to said question, testified further as follows: "Yes, sir."

And thereupon the said witness, upon direct examination by the United States attorney, further testified as follows:

"I got the bottle of whiskey that Mr. Mattoon, the agent, took

away from me on the 13th of March, from George Dick. I
14 bought it at Culdesac. Dick, the defendant, gave it to me. The bottle now shown me is the bottle. The agent took this away from me. Dick paid for this whiskey. I and Walter Slominee furnished the money. I furnished four dollars and Walter Slominee furnished fifty cents. Dick got this whiskey at the old man's shop. He stepped in and got it and brought it out. George Dick went in and got this whiskey and brought it out and give it to me.

Be it further remembered that thereupon the said witness upon cross-examination by Mr. Fogg, counsel for the defendant, further testified as follows:

"George Dick got this whiskey at Culdesac, the village of Culdesac, Nez Perces County. He gave me this whiskey, right there within five steps of the place, right in the village of Culdesac. At that time I had an allotment and trust patent. George Dick is a Umatilla Indian. He has an allotment of land in severalty. Al- this occurred right there near the door where he bought the whiskey. All these transactions were within the town of Culdesac."

Thereupon the said witness was excused.

Be it further remembered that thereupon F. G. MATTOON was called, sworn, and examined as a witness in behalf of the prosecution, and upon direct examination by the United States Attorney testified as follows:

"I am superintendent and acting agent of the Nez Perce Indians, and was such in the month of March last. As such agent I took this bottle away from Te-We-Talkt. This bottle contains about one quart of whiskey. The village of Culdesac is in Nez Perces County, State of Idaho."

Be it further remembered that thereupon, on cross-examination by Mr. Fogg, counsel for the defendant, the said witness further testified:

"Te-We-Talkt, Watch-le-Loome, Johnnie Yo-Gay-Nil are all Indians that have taken their allotments of land in severalty and had trust patents from the Government therefor at the time I speak of. The village of Culdesac is a village organized under the laws of the State of Idaho as a municipal corporation."

Be it further remembered that thereupon the following question was asked the said witness upon cross-examination by Mr. Fogg, of counsel for the said defendant:

"Is any portion of the territory included within the corporate limits of the village of Culdesac under your supervision as Indian Superintendent?"

Which question was objected to by the United States Attorney as incompetent, irrelevant and immaterial, and calling for a question of law. Which objection was then and there sustained by the court, to which ruling and decision of the court the defendant, by his said counsel, then and there excepted, which exception was at the time allowed by the court.

Be it further remembered that thereupon the said witness, upon further cross-examination, testified as follows:

"I do not know whether or not there are any Indians within the corporate limits of the village of Culdesac. There are about sixteen hundred Indians upon the reservation at the present time. Practically all the Indians own lands in severalty."

Be it further remembered that thereupon the said witness
15 was asked the following question upon cross-examination by Mr. Fogg, of counsel for the defendant:

"As a matter of fact, Mr. Mattoon, do not your duties at the present time as Indian Agent consist of representing the Government in reference to the land and property of the Indians, and some other duties in referrence to Indian Schools?"

Which question was objected to by the United States attorney upon the ground that the law defines the duties of the superintendent, and that this is a question for legal decision, which objection was sustained by the court, and the witness not permitted to answer the same. To which ruling and decision of the court the defendant, by his said counsel, then and there excepted, which exception was at the time allowed by the court.

Be it further remembered that thereupon the said witness, upon further cross-examination, testified as follows:

"I do not know of any reservation or any part of the reservation used for Government purposes or for Indian purposes within the boundaries of the village of Culdesac. I have no idea there is any such reservation within such village. Culdesac is seven or eight miles from the exterior boundaries of the Indian school reservation."

Whereupon said witness was excused.

Be it further remembered that thereupon WATCH-LE-AMNEE, a witness duly sworn and examined in behalf of the United States, testified as follows:

"The defendant, George Dick, purchased whiskey at Culdesac about the 13th day of March last, five bottles, and gave the whiskey to Te-We-Talkt and other Indians at Culdesac. The defendant had nothing to do with the whiskey after leaving Culdesac."

Whereupon said witness was excused.

Be it further remembered that JOHNNIE YO-GAY-NIL, a witness produced, sworn, and examined on behalf of the United States, testified as follows:

"I saw George Dick give this bottle of whiskey to Te-We-Talkt at Culdesac on the 13th of March. Nothing happened in relation to this whiskey outside of the village of Culdesac."

Whereupon said witness was excused.

Be is further remembered that thereupon EDWARD RABOIN, a witness produced, sworn, and examined in behalf of the United States, testified as follows:

"The defendant, George Dick, at the preliminary examination before Commissioner O'Neill at Lewiston, admitted and testified that he bought liquor at Culdesac at the time charged in the indictment, and that he and three other Indians drank up two bottles of liquor."

Be it further remembered that thereupon the bottle testified to by the witness was offered and received in evidence, together with the contents, as U. S. Exhibit No. 1.

Witness excused.

Be it further remembered that thereupon the defendant, GEORGE DICK, was called as a witness in his own behalf, — upon direct examination by Mr. Fogg, testified as follows:

"I am a Umatilla Indian. I have an allotment and a trust
16 patent therefor on the Umatilla Reservation at and before the time that the witness testified that I was at Culdesac. Had my trust patent for about three years."

Thereupon said witness was excused.

Be it further remembered that at the close of the testimony and proof in the said cause, and before the said c[illegible]se was submitted to the jury, the defendant, by his said attorneys, in writing, as required by the rules of said court, duly presented to said court specific requests for instruction, numbered 1 to 3, inclusive, which said requests for instructions to the jury are as follows:

"In the District Court of the United States within and for the District of Idaho, Northern Division, May Term, 1905.

UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Request for Instructions.

"The defendant requests the court to give severally and respectively the following instructions to the jury:

1.

(See instructions in judgment roll.)

That thereupon the court refused to give any or either of said instructions so requested by the defendant, and thereupon instructed and charged the jury as follows:

"GENTLEMEN: The only instruction I need to give you is this: If you find that the defendant had this bottle of whiskey upon him within the limits of what is known as Nez Perce Indian Reservation, then you are to find him guilty of this charge. The charge, of course, is for introducing liquor into the reservation, but I instruct you that having it in his possession upon the reservation is conclusive. When and where he bought it is immaterial; that it was in his possession within the limits of the Indian reservation is sufficient. I instruct you as a matter of fact, that Culdesac is within the limits of the reservation."

Be it further remembered that immediately after the giving of the said instructions and charge to the jury by the court, and immediately after the denying by the court of the defendant's requests to give either or any of the instructions so presented and requested in writing by the defendant, and in the presence of the jury and before the jury had retired to consider their verdict, the defendant excepted to the refusal of the court to give the instructions so requested, and the instructions given the jury by the court upon its own motion, specifically, as follows:

"The defendant excepts to the refusal of the court to grant the request for instructions numbered 1, 2, and 3, respectively, and specifically excepts to the refusal to grant each of said instructions. The defendant further excepts to the instructions given to the jury upon the court's own motion, particularly to that part of the instructions wherein the court instructs the jury that the village of Culdesac is a part of the Indian reservation, and substantially instructs the jury that the village of Culdesac is Indian country or Indian allotment within the meaning of the statute under which the indictment is laid. And further specifically objects to that portion of the instruction given by the court upon its own motion wherein
17 the court instructs the jury that 'if they find from the evidence that there was liquor found in the possession of the defendant, that that is conclusive presumption that he is "guilty" of introducing liquor upon the reservation.' Denying to the defendant a presumption of innocence and denying to the defendant the right to prove his innocence of the charge against him."

All of which exceptions were by the court at the time allowed and directed to be made a part of the record.

Be it further remembered that thereupon the jury retired by direction of the court to consider their verdict, and after being absent for a time returned in court on the said 15th day of May, 1905, their verdict being as follows:

"In the District Court of the United States in and for the District of Idaho. The United States of America *vs.* George Dick. Verdict: We, the jury sworn and empanelled in the above-entitled cause, find the defendant guilty as charged in said indictment.

"C. A. HAGAN, *Foreman.*

"(Endorsed:) Filed May 15, 1905. A. L. Richardson, clerk."

Be it further remembered that thereupon, in open court and before the jury was discharged, the defendant, by his counsel, excepted to the said verdict and moved that the same be set aside, which exception was at the time allowed by the court and made a part of the record herein.

Be it further remembered that thereafter, and on the 16th day of May, 1905, and before judgment was passed by the court upon the said verdict of guilty and conviction of the said offense so charged in said indictment, the said defendant, by his said counsel, made and filed in said court a motion in arrest of judgment, which said motion is as follows:

"In the District Court of the United States in and for the District of Idaho.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Motion in Arrest of Judgment.

"Comes now the defendant, George Dick, and moves the court that judgment be arrested and sentence be not passed in this action upon his conviction by the verdict of the jury, under his plea of "Not guilty" herein, for the reasons:

"1st. That the indictment herein does not state facts sufficient to constitute a public offense, nor does it state facts sufficient to constitute any offense or any violation of any law of the United States.

"2nd. That this court has no jurisdiction over the person of this defendant, nor over the offense stated or attempted to be stated in the said indictment, for the reason that it does not appear from the said indictment that the place where the said offense charged to have been committed is within the jurisdiction of the United States, but to the contrary it affirmatively appears from said indictment that the place where said offense is alleged to have been committed is within the jurisdiction of the State of Idaho, and further, that the law under which this defendant was indicted and arraigned is unconstitutional and void, for the reason that the Congress of the United States has no power to pass a law providing for police regulation over the
18 matters and things alleged in said indictment within the territory of the State of Idaho, or over the place where said offense is said to have been committed.

"Wherefore the defendant prays that judgment upon the said verdict and conviction be arrested and that he be discharged.

"Dated this 16th day of May, A. D. 1905.

"F. E. FOGG AND
"GEO. W. TANNAHILL,
"Attorneys for Defendant.

"(Endorsed:) Filed May 16th, 1905. A. L. Richardson, clerk."

Be it further remembered that on the day last aforesaid the said motion was duly submitted to the court for its decision thereon, and the court, after hearing argument thereon and being fully advised, overruled and denied said motion in arrest of judgment, to which ruling of the court the defendant, by his counsel, then and there duly excepted, which exception was allowed by the court, which ruling and decision of the court the defendant assigns as error.

Be it further remembered that thereafter, and on the 16th day of May, A. D. 1905, the court rendered its judgment and sentence upon said verdict so convicting the said defendant of the said offense set forth in the indictment herein, by which it was ordered and adjudged

that the said defendant be imprisoned in the Idaho State penitentiary at Boise, State of Idaho, for the term of one year and ten days, which judgment is filed in this court in this action and of record herein.

Be it further remembered that thereafter, and on the 24th day of May, and within ten days after the verdict herein, the said defendant, by his attorneys, made and filed in this action and served upon the United States district attorney a notice of intention to move for a new trial, which said notice is as follows:

"In the District Court of the United States in and for the District of Idaho, Northern Division, May Term, 1905.

"THE UNITED STATES OF AMERICA, Plaintiff,
vs.
"GEORGE DICK, Defendant.

"*Notice of Intention to Move for a New Trial.*

"To the plaintiff above named and to N. M. Ruick, district attorney, and by virtue thereof, attorney for plaintiff, and to each of you:

"Take notice that the defendant above named intends to and will move the above-entitled court to vacate and set aside the verdict rendered in the above-entitled cause, on the 15th day of May, A. D. 1905, and to grant a new trial of said cause upon the following grounds, to wit:

"1. Insufficiency of the evidence to justify the verdict and that the same is against law.

"2. Errors of law occurring at the trial and excepted to by the defendant.

"3. Errors of law occurring in the instructions of the court, wherein and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of the issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

"4. Errors of law in overruling the defendant's demurrer to the indictment herein, and overruling the defendant's motion in arrest of judgment, and in sentencing the defendant upon the indictment and the verdict returned and filed in said cause.

19 "Said motion will be made and based upon a statement of the case to be hereafter prepared and served, settled and filed, upon the indictment heretofore filed herein, and upon the defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above-entitled cause.

"F. E. FOGG AND
"GEO. W. TANNAHILL,
"*Attorneys for Defendant, Residing at Lewiston, Idaho.*

"(Endorsed:) Filed May 24th, 1905. A. L. Richardson, clerk."

Be it further remembered that thereafter, and on the said 24th day of May, 1905, the said defendant, by his said attorneys, made

and filed in this court and served upon the United States attorney his motion for a new trial, which said motion is as follows:

"In the District Court of the United States in and for the District of Idaho, Northern Division, May Term, 1905.

"THE UNITED STATES OF AMERICA, Plaintiff,
vs.
"GEORGE DICK, Defendant.

"***Motion for a New Trial.***

"Comes now the defendant above named, pursuant to notice heretofore given, and moves the court that the verdict rendered in the above-entitled cause on May 15th, 1905, be set aside and vacated and a new trial granted therein upon the following grounds:

"1. Insufficiency of the evidence to justify the verdict and that the same is against law.

"2. Errors of law occurring at the trial and excepted to by the defendant.

"3. Errors of law occurring in the instructions of the court wherein and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of the issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

"4. Errors of law in overruling the defendant's demurrer to the indictment herein, and in overruling the defendant's motion in arrest of judgment, and in sentencing the defendant upon the indictment and the verdict returned and filed in said cause.

"This motion will be made and based upon a statement of the case to be hereafter prepared and served, the indictment heretofore filed herein, defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above-entitled cause.

"F. E. FOGG AND
"GEO. W. TANNAHILL,
Attorneys for Defendant, Residing at Lewiston, Idaho.

(Endorsed:) "Filed May 24th, 1905. A. L. Richardson, clerk."

Be it further remembered, that at the same term of this court at which the trial was had and judgment rendered herein, and on the 16th day of May, 1905, the court made the following order:

"In the District Court of the United States in and for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

"Order Extending Time to Settle Bill of Exceptions.

"It appearing to the court that additional time is necessary
20 for the defendant to prepare and present a bill of exceptions during the trial for settlement:

"It is therefore ordered that the defendant's time for preparing, presenting, and serving upon the district attorney a bill of exceptions thereof, upon the trial of the cause, including exceptions taken to the overruling of the demurrer and exceptions to the order of the court overruling and denying defendant's motion in arrest of judgment and all the exceptions taken upon the trial, and the admission and rejection of evidence, and to the instructions of the court, be extended for sixty days from the date of this order.

"Done in open court this 16th day of May, A. D. 1905.

"JAS. H. BEATTY,
"District Judge.

(Endorsed:) "Filed May 16th, 1905. A. L. Richardson, clerk."

Specifications of Error.

Comes now the defendant, George Dick, and assigns and specifies the following grounds of error in the proceedings herein, upon which he will rely for the hearing of the said motion for a new trial, and upon appeal from the judgment herein, or upon appeal from the order, denying his said motion for a new trial, should the same be denied, all of which said errors are based upon exceptions duly taken and allowed, as hereinbefore set forth.

I.

The court erred in overruling defendant's demurrer to the indictment herein severally upon all the grounds stated in the said demurrer.

II.

The court erred in overruling defendant's objection to the following question asked the witness Te-we-Talkt on direct examination: "You are a Nez Perce Indian living on the Nez Perce Indian Reservation?" and in permitting said witness to answer said question, and in admitting any evidence in said indictment, upon all the grounds severally stated in said objection.

III.

The court erred in sustaining the objection of the United States attorney to the following question asked the witness F. G. Mattoon, on cross-examination: "Is any portion of the territory included within the corporal limits of the village of Culdesac under your supervision as Indian superintendent?"

IV.

The court erred in sustaining the objection of the United States attorney to the following question asked the witness F. G. Mattoon, on cross-examination: "As a matter of fact, Mr. Mattoon, do not your duties at the present time as Indian agent consist in repre-
21 senting the Government in reference to the land and property of the Indians, and some other duties in reference to Indian schools?"

V.

The court erred in refusing and failing to give each of the instructions requested by the defendant, numbered 1 to 3, inclusive, respectively.

VI.

The court erred in instructing the jury as a matter of law that the village of Culdesac is a part of the Indian reservation, and in substantially instructing the jury that the village of Culdesac is Indian country, within the meaning of the statute under which the indictment was laid.

VII.

The court erred in instructing the jury as follows: "That I instruct you that having it in his possession upon the reservation is conclusive. When and where he bought it was immaterial. That it was in his possession within the limits of the Indian reservation is sufficient," said instruction denying to the defendant the presumption of innocence, and denying to the defendant the right to prove his innocence of the charge against him.

VII.

The court erred in rendering judgment upon the said verdict, because the said verdict is contrary to law and the evidence, and the defendant now specified the following particulars in which the evidence is insufficient to support the verdict, judgment, and sentence:

1. There is no evidence whatever that the defendant introduced the liquor mentioned in the indictment, or any liquor into the Indian country, or upon an Indian allotment, or upon any other place prohibited by the statute.

2. There is no evidence that the defendant introduced the said whiskey from any point without to any point within the boundaries of the Nez Perce Reservation.

3. The evidence affirmatively and without conflict shows that the

defendant did not introduce the whiskey into the Indian country, but that he bought it within a few feet of the place where he delivered it to the Indian, Te-we-Talkt, and others.

4. The evidence affirmatively and without conflict shows that the defendant exercised no dominion or control, directly or indirectly, over the said whiskey, except within the corporate limits of the village, of Culdesac, and that he did not exercise any control over the said whiskey at any place where the Government of the United States had any jurisdiction for the purpose of police control, but to the contrary that the village of Culdesac is a place exclusively within the sovereignty of the State of Idaho for all purposes of police control.

22 IX.

The court erred in overruling and denying defendant's motion in arrest of judgment and in passing judgment and sentence upon the defendant upon all grounds severally stated in said motion.

Wherefore comes now the defendant, by his counsel, and presents this, his bill of exceptions and statement of case on motion for new trial, and statement of case on appeal to the Circuit Court of Appeals and statement of case on appeal from order denying said motion for a new trial, should the same be denied, and asks that the same be settled and certified by the honorable district judge and filed in this action as such.

F. E. FOGG AND
GEO. W. TANNAHILL,
Attorneys for Defendant.

Due service of the above and foregoing bill of exceptions and statement of case is hereby acknowledged and receipt of copy admitted this 15th day of July, 1905.

And it is further stipulated and agreed that the same may be forthwith and without further notice presented to the hon. district judge for settlement.

N. M. RUICK,
U. S. District Attorney, Boise, Idaho.

The foregoing bill of exceptions and statement of case on motion for a new trial having been prepared, served, and presented for settlement within the time granted by law, the rules of this court and the order of the hon. judge in the above-entitled court, and the same having been examined and no amendments having been proposed thereto, and the hon. United States attorney consenting thereto, the same is hereby settled, and it is hereby certified that the foregoing bill of exceptions and statement of case is true and correct.

Done at Chambers this 21st day of July, 1905.

JAS. H. BEATTY,
Judge of the U. S. District Court
for the District of Idaho.

(Endorsed:) No. 565. In the U. S. District Court for the District of Idaho, Northern Division, May term, 1905. United States

of America, plaintiff, *vs.* George Dick, defendant. Bill of exceptions and statement of case. Filed July 24th, 1905. A. L. Richardson, clerk. F. E. Fogg and Geo. W. Tannahill, attorneys for defendant, residing at Lewiston, Idaho.

23 *Opinion.*

In the District Court of the United States for the District of Idaho.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
H. F. SCHISSLER ET AL., Defendants.

N. M. Ruick, U. S. attorney for plaintiff.
Fogg & Tannahill, attorneys for defendants.

BEATTY, *District Judge:*

Under the demurrer to the indictment it is claimed that, notwithstanding the treaty or agreement entered into between the Government and the Nez Perce tribe of Indians on May 1, 1893 (28 Stats., 326), the statutes concerning the introduction of intoxicating liquors into the Indian reservation and the sale thereof to Indians belonging to such reservation, are not applicable to the Nez Perce Indian Reservation; and *In re* Heff, 197 U. S., 488, is relied upon to support the demurrer. That decision is based upon an act providing for the allotment of lands in severalty to the Indians on the Indian reservations, approved February 8, 1887 (24 Stats., 388). It authorized the President to procure the survey and allotment of the lands in severalty to the Indians for issuing patents therefor to them to be held in trust by the Government for twenty-five years, when final patent shall be issued to the allottees or their heirs, and that upon the completion of the allotments and the patenting of the lands to the allottees, the latter shall be subject to all the laws, civil and criminal, of the State in which they reside; and that any Indian who has taken up "his resident- separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens." In construing this act the Supreme Court held that, when under its provisions, an Indian allottee of Indian lands became subject to the laws of the State in which he resided, and a citizen of the United States, he, like all other citizens, ceased to be a ward of the nation, and was subject to its laws just as other citizens were, and not otherwise; and as a consequence, any one selling liquor to him was not subject to the laws concerning the sale of intoxicants to Indians.

The demurrer in this case must be considered in connection with the agreement with the Nez Perce Indians above referred to. This agreement, after referring to the said act of 1887 as authority for negotiating with the Nez Perce Indians for the cession of their surplus lands, recites that in pursuance of the provisions of said act the

agreement is made, which, after providing for the cession of the lands, the consideration and payments therefor, and other matters, provides as follows:

"Article IX. It is further agreed that the lands by this agreement ceded, those retained, and those alloted to the said Nez Perce Indians, shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, 24 whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians."

Such are the only provisions of this agreement possibly bearing upon the question at issue, and there are no provisions placing such Indians under the laws of the State or making them citizens of the United States. If they are subject to such laws or have such rights of citizenship, it must be by virtue of the act of 1887 and other acts. This agreement was "accepted, ratified, and confirmed" by Congress, which gives its provisions the same effect as any other law enacted by that body. While, as stated, this agreement recites that it is made in pursuance of the provisions of the other act, it does not follow that all of them are adopted. That act is referred to as the general authority for negotiating with the Indians for the cession of their lands, in pursuance of which this agreement is made. But it must result that any portions of such act which are in conflict with the agreement and later law must yield to it. It may be conceded that the conclusions of the court in the cited case concerning the citizenship of Indians and their exemption from control of United States police laws and regulations, would apply also to these Nez Perce Indians, if there is no conflict between the acts referred to. While this later agreement or act makes no provision for the citizenship of such Indians, or for their control by such laws, it may still be conceded that the provisions of the other act in such matters would apply to them if their logical results, as construed by said court, would not bring them in conflict with the later law; but this later law, on said agreement, does provide unequivocally that all the lands within this Nez Perce Reservation shall be subject for twenty-five years to all the United States laws regulating the introduction of intoxicants thereon, and that all the Indians allottees of such reservation, whether under the care of an agent or not, shall for a like period be subject to all such laws prohibiting the disposition of intoxicants to Indians. This provision is too plain for doubt, and it can not be made clearer by discussion. It leaves the entire reservation and all the Indian allottees thereof for twenty-five years from May 1, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these provisions of the act of 1887 are not applicable to the Nez Perce Indians, and that they are neither citizens nor subject to the laws of the State, but are still

the wards of the nation, at least so far as concerns the laws regulating the sale of intoxicants; but whether that result must follow, or whatever the result, it can not be conceded that this Article IX of the agreement is not to be enforced to its full letter and intent. It was a solemn agreement entered into between the Government and these Indians, who are far above the average Indians in intelligence, and many of whom have had long Christian training and who know the evils of the liquor traffic upon their race. It is well understood that this provision of the treaty or agreement was especially insisted upon by them for the protection of their people. For them they
25 desired and asked the intervention of the strong arm of that Government which they with unfeigned simplicity rely upon, as the child upon its father. I can not think that this provision of a solemn compact, intended to shelter from debauch and destruction a subjected and dependent people, will be so emasculated by judicial construction as to turn loose upon them a vampire class, totally reckless of the Indians' welfare of law and of society. Such a result can not be made to appear to the untutored savage as consistent with our contract with them, or with honor. I feel no hesitation in holding that this agreement with the Indians must be enforced, and that this conclusion is not in conflict with the ruling cited by the Supreme Court, in which was not involved any similar statute.

The laws applicable to intoxicants in the Nez Perce Reservation are still valid, and will be enforced by the court as they have been, until it is overruled by some controlling court. The demurrer is overruled.

NOTE.—This ruling and opinion shall be considered as made in the other like cases wherein a similar demurrer was overruled.

Dated May 26th, 1905.

(Endorsed:) No. 565. U. S. District Court, Northern Division, District of Idaho. The United States *vs.* H. F. Schissler *et al.* Opinion on demurrer. Filed Aug. 1st, 1905. A. L. Richardson, clerk.

Order Denying Motion for a New Trial.

In the United States District Court for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
GEORGE DICK, Defendant.

Order Denying Motion for New Trial.

This cause came on to be heard the 14th day of August, A. D. 1905, pursuant to notice heretofore given, upon the defendant's motion for a new trial herein; Geo. W. Tannahill and F. E. Fogg, esqrs., appearing in support of said motion and N. M. Ruick, United

States district attorney for the Northern Division, District of Idaho, appearing in opposition thereto.

After hearing the argument of the respective counsel and having duly considered the same, being fully advised in the premises the court orders that said motion be and the same hereby is overruled and denied.

Now, therefore, by reason of the law and the premises aforesaid it is ordered that said motion for a new trial be, and the same hereby is, overruled and denied, to which the defendant excepted, and exception is hereby settled and allowed.

Done at chambers this 14th day of August, A. D. 1905.

JAS. H. BEATTY,
United States District Judge for the Northern Division, District of Idaho.

(Endorsed:) No. 565. In the United States District Court, District of Idaho, Northern Division. United States of America, plaintiff, *vs.* George Dick, defendant. Order denying motion for a new trial. Filed Aug. 15, 1905. A. L. Richardson, clerk.

26 In the District Court of the United States for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Assignment of Error.

Comes now the defendant, George Dick, and says that in the records and proceedings in the above entitled cause there is manifest error, in this, to-wit:

1.

That the Court erred in its judgment herein, and that said judgment is without jurisdiction and void.

2.

That the Court erred in overruling defendant's demurrer to the indictment herein, severally upon all the grounds stated in said demurrer.

3.

The Court erred in overruling defendant's objection to the introduction of any evidence in the case, and in admitting any evidence upon the trial under said indictment, upon all the grounds severally stated in defendant's objection, and made a part of the bill of exceptions herein.

4.

The Court erred in sustaining the objection of the United States Attorney to the following question asked the witness, F. G. Mattoon,

upon cross examination: "Is any portion of the territory included within the corporal limits of the Village of Culdesac under your supervision as Indian superintendent?"

5.

The Court erred in refusing and failing to give each of the instructions requested by the defendant, numbered 1 to 3 inclusive, respectively, upon all the grounds stated in defendant's exception thereto.

27

6.

The Court erred in instructing the jury as a matter of law that the village of Culdesac is a part of the Indian reservation and in substantially instructing the jury that the village of Culdesac is Indian country, within the meaning of the statute under which the indictment was laid.

7.

The Court erred in instructing the jury as follows: "That I instruct you that having it in his possession upon the reservation is conclusive. When and where he bought it was immaterial. That it was in his possession within the limits of the Indian reservation is sufficient," said instruction denying to the defendant the presumption of innocence, and denying to the defendant the right to prove his innocence of the charge against him.

8.

The Court erred in rendering judgment upon the verdict, because the said verdict is contrary to law and the evidence, and the defendant now specifies the following particulars in which the evidence is insufficient to support the verdict, judgment and sentence:

1. There is no evidence whatever that the defendant introduced the liquor mentioned in the indictment, or any liquor into the Indian country, or upon an Indian allotment, or upon any other place prohibited by the statute.

2. There is no evidence that the defendant introduced the said whiskey from any point without to any point within the boundaries of the Nez Perce Reservation.

3. The evidence affirmatively and without conflict shows that the defendant did not introduce the whiskey into the Indian country, but that he bought it within a few feet of the place where he delivered it to the Indian, Te-we-Talkt, and others.

28 4. The evidence affirmatively and without conflict shows that the defendant exercised no dominion or control, directly or indirectly, over the said whiskey, except within the corporate limits of the village of Culdesac, and that he did not exercise any control over the said whickey at any place where the Government of the United States had any jurisdiction for the purpose of police control, but to the contrary that the village of Culdesac is a place exclusively within the sovereignty of the State of Idaho for all purposes of police control.

9.

The Court erred in overruling and denying defendant's motion in arrest of judgment and in passing judgment and sentence upon the defendant upon all grounds severally stated in said motion.

10.

The Court erred in overruling defendant's motion for a new trial.

11.

The defendant further says: That each of the foregoing decisions and rulings of the court hereinbefore specified and assigned as error are upon questions involving the jurisdiction of the said court, and the con-truction and application of the constitution of the United States, and the constitutionality of the laws of the United States, and that the Court erred in finding and deciding in its ruling upon the defendant's demurrer to the indictment herein, the act of August 15th, 1894, 28 Stat. L. 326, ratifying the agreement of May 1, 1893 with the Nez Perces to be constitutional and valid in as far as it provided that the lands ceded by said agreement shall be subject for the period of twenty-five years to all of the laws of the United States prohibiting the introduction of intoxicants into the Indian country; and, further, in finding and deciding that the act
29 of February 8, 1887, 24 Statute- 388, in as far as inconsistent with said act of August 15, 1894, is not applicable to the Nez Perce Indians, and that said Indians are neither citizens nor subject to the laws of this state, but are still wards of the nation, in as far as concerns the laws regulating the sale of intoxicants; and in finding and deciding that the statute of the United States prohibiting the introduction of liquor into the Indian country under which the defendant was indicted, was applicable to the Nez Perce Reservation. And defendant says that the jurisdiction of said court over the defendant and the subject matter of said action, as well as the construction and application of the constitution of the United States, and of the constitutionality of the said law and statute, and validity and construction of the said treaty with the said Nez Perce Indians, was so put in issue and specifically decided by the court upon the ruling to the demurrer to the indictment, and upon the defendant's objection to the introduction of evidence in the case, and by the defendant's request for instruction and his exceptions to the instructions given by the Court, and upon his motion in arrest of judgment, and by his bill of exceptions and specifications of error therein, and that all of the proceedings of said court were without jurisdiction, and that the verdict and judgment of said court are void.

Wherefore, said George Dick, defendant in said action and plaintiff in error, prays that the said judgment of the said United States District Court for the District of Idaho be reversed and set aside.

FRANK E. FOGG,
Attorney for said Defendant and Plaintiff in Error.

(Endorsed:) In the District Court of the United States for the District of Idaho, Northern Division. The United States of America *v.* George Dick. Assignment of error. Filed June 15th, 1906. A. L. Richardson, Clerk.

30 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between The United States, plaintiff, and George Dick, defendant, a manifest error hath happened, to the great damage of the said George Dick, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 7th day of May, in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOSEPH McKENNA,
Associate Justice of the Supreme Court of..
the United States.

[Endorsed:] The United States *vs.* George Dick Writ of Error Filed May 14, 1906. A. L. Richardson Clerk, U. S. Dist. Court.

31 UNITED STATES OF AMERICA, *ss:*

To The United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the District Court of the United States for the District of Idaho wherein George Dick is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error

mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Joseph McKenna, Associate Justice of the Supreme Court of the United States, this seventh day of May, in the year of our Lord one thousand nine hundred and six.

JOSEPH McKENNA,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] The United States *vs.* George Dick Citation Filed May 15, 1906 A. L. Richardson Clerk U. S. District Court.

On this 15th day of May, in the year of our Lord one thousand nine hundred and six, personally appeared Frank E. Fogg before me, the subscriber, and makes oath that he delivered a true copy of the within citation to N. M. Ruick United States Attorney for the District of Idaho, at Moscow within said District on this 15th day of May 1906.

FRANK E. FOGG.

Sworn to and subscribed the 15 day of May, A. D. 1906.

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON,
Clerk U. S. Dist. Court.

32 In the District Court of the United States in and for the District of Idaho.

THE UNITED STATES OF AMERICA
vs.
GEORGE DICK.

Certificate of Clerk to Transcript.

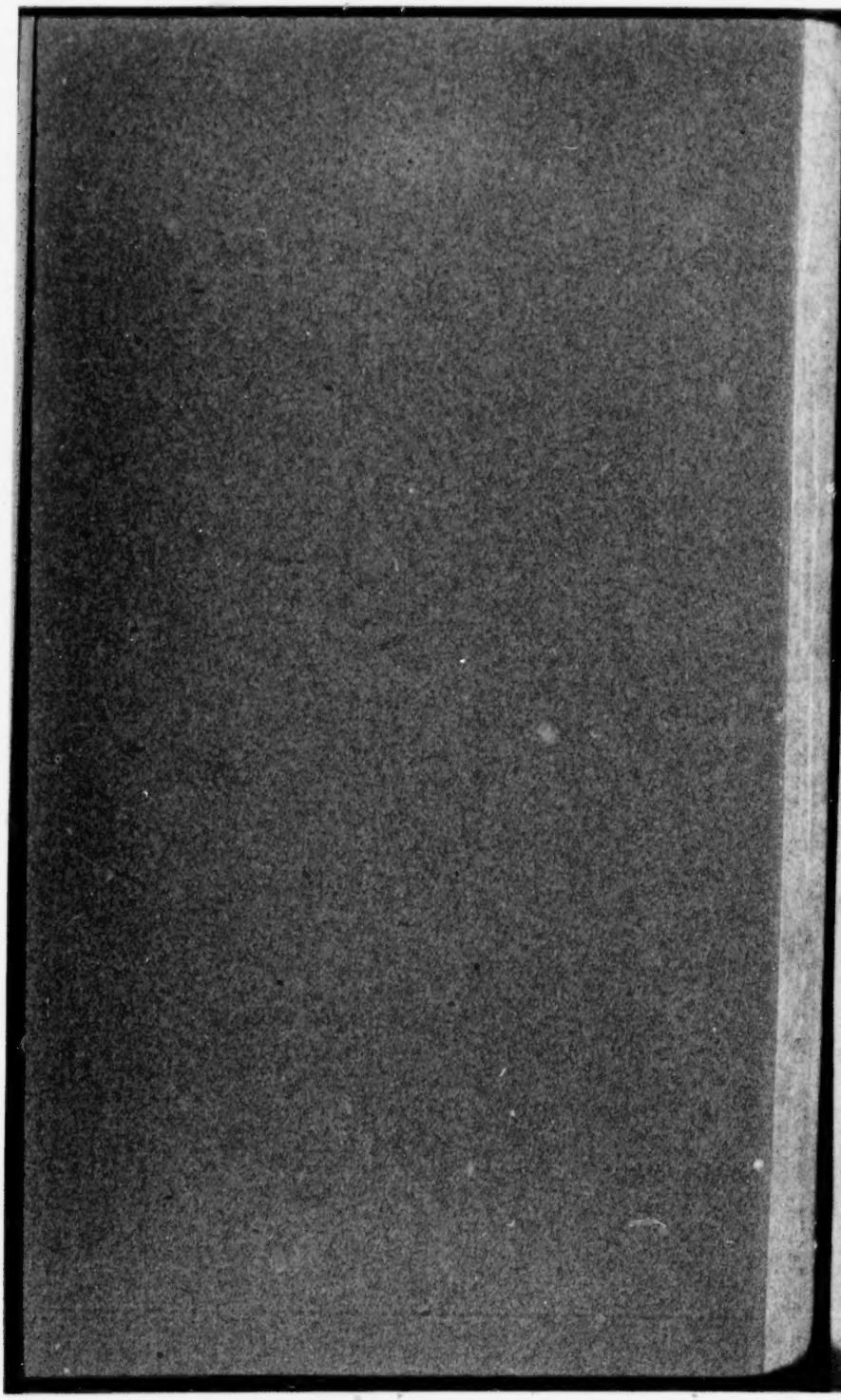
I, A. L. Richardson, Clerk of the United States District Court within and for the District of Idaho, do hereby certify *that* the foregoing transcript of pages, numbered from 1 to 32, inclusive, to be a true copy of the record and of the assignment of error, and of all the proceedings had in the above entitled matter in the said District Court of the United States, within and for the district of Idaho, including the opinion filed, as the same remain of record in my office, and that the same together constitute the transcript upon return to the writ of error to the Supreme Court of the United States, in the above entitled action.

Attest my hand and the seal of the said United States District Court, within and for the District of Idaho, at Boise, this 29th day of June, 1906.

[Seal United States District Court, Idaho, 1890.]

A. L. RICHARDSON, *Clerk.*

Endorsed on cover: File No. 20,303. Idaho D. C. U. S. Term No. 338. George Dick, plaintiff in error, *vs.* The United States. File July 6th, 1906. File No. 20,303.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 62

GEORGE DICK,

Plaintiff in Error

vs.

THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT.

This case is upon writ of error to the District Court of the United States for the District of Idaho.

George Dick the plaintiff in error was convicted and sentenced to a term in the penitentiary and to the payment of a fine and costs upon a charge of introducing liquor into the Indian country (Transcript, page 8.)

Writ of error was duly allowed and citation duly served. (Transcript, pages 31 and 32.)

The plaintiff specifies and assigns as error the decision and ruling of the court upon questions involving the jurisdiction of the said court and the construction and application of the

constitution of the United States and the constitutionality of the laws of the United States. (Transcript page 30.)

The plaintiff in error was charged in the indictment with violation of section 2139 R. S., as amended by 29 Stat. L. 506 (Transcript page 1), which amended statute, among other things, provides as follows:

"Any person who shall introduce, or attempt to introduce any malt, spirits, or vinous liquors, * * of any kind whatsoever, into the Indian country, which terms shall include any allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee, without the consent of the United States, shall be punished, etc."

29 Stat. L. 506.

The indictment, conviction and commitment of the plaintiff in error, Dick, are founded upon the charge of introducing liquor in the village of Culdesac, an incorporated village within the state of Idaho.

The testimony of United States Witness Te-We-Talkt is in part as follows:

"George Dick got this whiskey at Culdesac, the village of Culdesac, Nez Perce county. He gave me this whiskey right there within five steps of the place, right in the village of Culdesac. All this occurred right there near the door where he bought the whiskey. All these transactions were within the town of Culdesac." (Transcript, page 15.)

United States witness F. G. Mattoon (Transcript, page 15), testified as follows:

"The village of Culdesac is in Nez Perce county, state of Idaho. The village of Culdesac is a village organized under the laws of the state of Idaho as a municipal corporation.

The village of Culdesac is not within any reservation used for any government purpose of for Indian purposes nor upon any Indian allottment."

Testimony of United States witness F. G. Matoon (Transcript, page 16.) is as follows:

"I do not know of any reservation or any part of a reservation used for government purposes or for Indian purposes within the boundaries of the village of Culdesac. I have no idea there is any such reservation within such village. Culdesac is seven or eight miles from the exterior boundaries of the Indian school reservation."

There is no dispute about the fact, indeed, there could be none, as the District Court of Idaho, and this Court, we assume, takes judicial knowledge of the location of an incorporated town and that under the laws of the United States lands reserved for the use and occupation of Indians, or for any government purpose, could not be included within a patent of the United States to the inhabitants of a town under the townsite laws.

The Court of Appeals in a decision rendered in a habeas corpus proceeding involving the identical facts shown by the transcript herein says:

> "The Village of Culdesac is located upon land ceded by the Indians to the United States, about six or seven miles from the exterior boundary of the Indian School Reservation, and no reservation or any part of a reservation used for government purposes, or for Indian purposes is within the boundaries of such village. Prior to the transaction involved in this case the title to the lands upon which the village of Culdesac is located had passed from the United States by patent under the townsite laws to the Probate Judge of Nez Perce country, Idaho, in trust for the inhabitants of the village."
>
> 141 Fed 7.

The defendant Dick demurred to the indictment and therein specifically challenged the jurisdiction of the court upon the ground, among others, that the Indian title to the land embraced within the former Nez Perce Indian Reservation had been relinquished by allotment of the land in severalty to the Indians and the purchase of the remaining land by the government, and that said land had been opened to settlement and the government title had passed to the citizens of Idaho under the homestead and townsite laws—and that the lands em-

braced in said reservation were not at the time of the alleged offense "Indian country."

The court rendered a decision overruling defendant's demurrer deciding among other things, as follows (Transcript page 26).

"It leaves the entire reservation and all the Indian allottees thereof for twenty-five years from May 1st, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these provisions of the act of 1887 are not applicable to a Nez Perce Indian, and that they are neither citizens nor subject to the laws of the state but are still the wards of the nation, at least so far as concerns the laws regulating the sale of intoxicants."

The defendant upon the offer of proof under the indictment again challenged the jurisdiction of the Court and urged the unconstitutionality of the law under which the indictment was laid. (Transcript, page 14.)

The jurisdiction of the Court as well as the constitutionality and the construction of the statutes is again brought in question by the defendant upon his motion in arrest of judgment. (Transcript, page 19.)

The defendant in the District Court, in a statement of the case which was certified by the Hon. District Judge specifies, among others, the following ground of error: (Transcript, page 24.)

"The evidence affirmatively and without conflict shows that the defendant exercised no dominion or control, directly or indirectly, over the said whiskey except within the corporate limits of the village of Culdesac and that he did not exercise any control over the said whiskey at any place where the government of the United States had any jurisdiction for the purpose of police control but to the contrary, that the village of Culdesac is a place exclusively within the sovereignty of the state of Idaho for all purposes of police control."

Assignment of Errors.

The position and contention of the plaintiff in error upon the appeal is summarized in paragraph 11 of his assignments of error herein as follows: (Transcript page 30.)

"That each of the foregoing decisions and rulings of the court hereinbefore specified and assigned as error are upon questions involving the jurisdiction of the said Court, and the construction and application of the constitution of the United States, and the constitutionality of the laws of the United States and that the Court erred in finding and deciding in its ruling upon the defendant's demurrer to the indictment herein, the act of August 15th, 1894, 28 Stat. L. 326, ratifying the agrement of May 1st, 1893, with the Nez Perces to be constitutional and valid in so far as it provided that the lands ceded by said agreement shall be subject for the period of twenty-five years to all of the laws of the United States prohibiting the introduction of intoxicants in to the Indian country; and further in finding and deciding that the act of February 8th, 1887, 24 Stat. L. 388, in as far as inconsistent with said act of August 15th, 1894, is not applicable to the Nez Perce Indians, and that said Indians are neither citizens nor subject to the laws of the state, but are still wards of the nation in as far as concerns the laws regulating the sale of intoxicants: and in finding and deciding that the statute of the United States prohibiting the introduction of liquor into the Indian country, under which the defendant was indicted was applicable to the Nez Perce Reservation. And defendant further says that the jurisdiction of said court over the defendant and the subject matter of said action, as well as the construction and application of the constitution of the United States, and of the constitutionality of the said law and statute, and validity and construction of the said treaty with the said Nez Perce Indians, was so put in issue and specifically decided by the Court upon the ruling to the demurrer to the indictment, and upon the defendant's objection to the introduction of evidence in the case, and by the defendant's request for the instructions and his exceptionsto the instructions given by the Court,and upon his motion in arrest of judgment and by his bill of exceptions and specifications of error therein, and that all of the proceedings of said Court were without jurisdiction, and that the verdict and judgment of the said court are void."

ARGUMENT.

The record herein presents the clean-cut issue: Has the United States jurisdiction for the purpose of local police control over territory within a state owned in fee by white citizens of such state, and not reserved for use and occupancy by Indians, nor for any government purpose whatsoever.

In the present case the sale of liquor was made in a municipal territory clearly within the jurisdiction of the state and outside the jurisdiction of the United States. With respect to such a case this Court has said:

> "It will not be doubted that an act of congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state wouldbe an invasion of the state's jurisdiction and could not be sustatined, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two."
>
> In re Heff 197 U. S. 505.

I believe that the broad constitutional question decided in re Heff, supra—that there can be in police matters *no such thing as a divided sovereignty*, is absolutely controlling in the case at bar, and that the plaintiff in error's case might well be submitted upon the simple statement of the foregoing proposition.

But in the present case there are even stronger reasons than were presented in the matter of Heff, supra, for denying to the United States jurisdiction in the premises.

In the matter of Heff, this Court based its decision upon the unconstitutionality of the act of January 30, 1897, 29 State. L. 506, in as far as that act attempted to control the sale of liquors to an Indian, to whom an allotment of land has been made, and who, by the act of receiving such allotment, had become, under the laws of the United States a citizen of the United States and of the state wherein he resides. While in the case at bar, I contend that even if the statute could be

held constitutional the acts charged do not constitute an offence under the statute.

The statute provides, among other things, as follows:

> Any person who shall introduce, or attempt to introduce any malt, spirits, or vinous liquors,* of any kind whatsoever, into the Indian country, which term shall include any Indian allotment, while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished, etc.
> 29 Stat. L. 506.

This statute is subsequent to the act of congress ratifying the agreement with the Nez Perces, by which it was attempted to retain jurisdiction over the lands ceded by the Nez Perce Indians for the purpose of regulating the sale of intoxicating liquors, and amends the then existing laws, in so far as inconsistent in its provision. The fact that Congress provided that the term "Indian Country" should include any Indian allotment while the title to the same should be held in trust by the government would indicate that the term as used in that act, was not deemed sufficiently broad to include land with which the government had parted with title, even though it be held in trust for the Indian, and, *a fortiori* must the term "Indian country" have been used in a sense excluding entirely lands that the government had patended to white citizens without any restrictions whatsoever. Therefore, it seems to me that by the very terms of the act under which the plaintiff in error was charged, even if the same could be held constitutional, that the lands included within the Village of Culdesac, the title to which had passed from the United States without restriction, are excluded from the term "Indian Country," as contained in said act.

There can be no doubt that the effect of the act of January 30th, 1897, 29 Stat. L. 506, is to amend the laws existing at the time of the agreement of May 1, 1893, with the Nez Perces, in relation to the prohibition of the introduction of intoxicating liquors into the Indian country, by provding a definition of the term Indian country, which by specifically including any Indian allotment while the title to the same shall be held in trust by the government, thereby excluded the idea

that the term "Indian Country" includes lands of which the title had passed by government patent to citizens of the state without resriction. This act is of general application, and the Nez Perce Indian reservation is in no manner excepted from its provisions. It cannot be successfully maintained that Congress by the act of ratifying the agreement with the Nez Perces, could place any restrictions upon future legislation, amending or even abrogating the existing law in reference to the prohibition of the introduction of liquor.

The plenary power of Congress over tribal relations and lands cannot be limited by provisions of treaty so as to preclude future enactments, giving effect to the government policy in relation thereto.

Lone Wolf v. Hitchcock, 187 U. S. 553.

A brief consideration of the principles upon which this Court decided, in the matter of Heff, that the act of 1897, 29 Stat. L. 506, was invalid, in as far as it attempted to regulate the sale of liquor to an Indian who had become a citizen, I think will lead to the conclusion that it is equally invalid in as far as it is attemtped to prohibit the introduction of liquor for the purpose of commerce with citizens at any place where the government has parted with its title to the citizens of the state without any restriction.

This Court, in a line of decisions reaching from a period of nearly a century, has based the power of the Federal government to legislate in reference to the sale of liquor to Indians solely upon the provision of section 8, article 1, of the Constitution, granting to Congress power "to regulate commerce with foreign nations, and among the several states, and with Indian tribes."

For the purpose of giving effect to this provision of the Constitution, Indian tribes were considered as standing in a similar position to foreign nations, and members of Indian tribes were treated in analogy to citizens of a foreign country.

As long as the tribal relations were maintained, this Court has repatedly held that Congress, under this provision of the Constitution, had power not only to prohibit the sale of liquor within the Indian country, but to members of the tribes outside of the Indian country, and in United States v. Forty three

Gallons Whisky, 93 U. S., 198, held that congress had power to exclude spirituous liquors not only from Indian countries, but from that which has ceased to be so by reason of its cession to the United States, but being within territory in proximity to that where the Indian lived. This case does not sustain the position that the United States has jurisdiction in the case at bar. It will be noted, however, that the authority of Congress in that case is predicated entirely upon the clause i n the constitution relating to the regulating of commerce with Indian *tribes*. The Court in that case, referring to United States vs. Holliday, 3 Wall, 409, which is followed, says:

> But this Court held that the power to regulate commerce *with Indian tribes* was in its nature general and not confined to any locality, that its existence carried with it the right to exercise it *whenever there was a subject to act upon*, although within the limits of the state, and that it extended to the regulations of commerce with the individual members of such *tribes*. * * * * * *

The Court then proceeds to apply these principles to the case under consideration, as follows:

> As long as the Indian remains a *distinct people with the existing tribal organizations*, recognized by the Political Department of the Government, Congress has power to say with whom and on what terms they shall deal, and what articles shall be contraband.

The Court in this case also cites Worcester v. Georgia, 6 Pet. 515, and commenting upon that case says:

> Chief Justice Marshall, in this case with force of reasoning and extent of learning rarely equalled, stated and explained the condition of the Indians in their relation to the United States and to the states within whose boundaries they lived, and this exposition was *based on the power to make treaties and regulate commerce with the Indian tribes*, * * * * and Congress has now the exclusive and unfettered power to regulate commerce with the *Indian tribes*, a power as broad as to regulate commerce with foreign nations.

In a decision sustaining the constitutionality of the act of 1862 amending the act of June 30th, 1834, 4 Stat. U. S. 732,

prohibiting the sale of spiritous liquors to an Indian under the charge of an Indian agent, this Court said:

> The locality of the traffic can have nothing to do with the power. The right to exercise it in refernce to any *Indian tribe* or any person who is a *member of such tribe* is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitntion authorizes Congress to regulate any other commerce, originated and ended within the limits of a single state, than commerce with the *Indian tribes.*
>
> United States v. Holliday, 3 Wall. 407-420.

The only essential point decided in Bates v. Clarke, 95 U. S. 204, is that all the country described by the act of 1834 as Indian country, remains Indian country so long as the Indians retain their title and right to the soil, and ceases to be Indian country whenever they lose their title, in absence of any different provision by treaty or by act of Congress. And in this case the Court holds that the territory upon which the liquor was seized had ceased to be Indian country as soon as the Indians parted with title, without any further act of Congress.

And in this case the Court distinguished its decision in United States v. Forty-three Gallons Whisky, supra, as follows:

> While the Court holds that by a certain clause in the treaty by which the *locus in quo* was ceded by the Indians, it remains Indian Country until they remove from it. The whole opinion goes upon the hypothesis that when the Indian title is extinguished, it ceases to be Indian Country, unless some such reservation takes it out of the rule.

It will be noted that the treaty with the Red Lake and Pembina band of Chippewa Indians, ceding to the United States a portion of their land was concluded on October 2, 1863, and it was under this treaty and under the condition then existing, and under the policy then pursued by the United States in the government of Indians, that the decision in United States v. Forty-three Gallons Whisky, supra, was based.

The distinction between that case and the case at bar is ap-

parent and well defined. There was nothing in that treaty looking to the dissolution of the tribal relation of the Indians, the tribes remaining intact, and at that time the policy of the Government was to deal with the Indians by treaties, and as a people distinct from the citizenry of the nation.

By the act of March 3, 1871, 16 Stat. L. 556, it is provided:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty.

Referring to the act of Congress above quoted, this Court has said:

> After an experience of one hundred years of treaty-making sytem of government, Congress has determined upon a new departure—to govern them by acts of Congress.
>
> United States v. Kagama, 118, U. S. 375.

And in the matter of Heff, 197 U. S., page 499, says:

> From that time on, the Indian tribes and individual members therof, had been subject to direct legislation of Congress, which for some time therafter continued the policy of locating the tribes of separate reservations, and perpeutating the communal of tribal life. * * * * Of late years, a new policy has found expression in the legislation of Congress, a policy which looks to the breaking up of tribal relations, the establishing of separate indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States."

It is under these later conditions, and the present policy of the government, and of Congress, that we must view the statute under which the plaintiff in error was convicted—interpret and construe it in reference to the agreemnt of May 1, 1893, with the Nez Perces; test its constitutionality, and weigh the power of Congress to reserve partial sovereignty within the former Nez Perce reservation.

The very effect and purpose of this agreement of May 1, 1893, with the Nez Perces was to break up the tribal relations;

to dissovle the tribal entity; to do away with the last remnant of inter-tribal customs, government, and police control; to remove the very machinery of government supervision and control, and renounce the guardianship of the government over the persons of the Indians; to renounce as well anything like a general guardianship over even the property of the Indian —the Indian being left free to hold property and contract for himself in reference thereto, save a restriction upon the alienation of land patented to him by the government.

In fact, the Government of the United States, by the very act of ratifying the said agreement with the Nez Perces, not only renounced its guardianship with the Nez Perces, not only renounced its guardianship of the person and general property of every Indian of the former Nez Perce tribe, but practically destroyed the very machinery by which the Indians could govern themselves.

Unless the sixteen hundred Indians immediately become full citizens of the state of Idaho, and, in fact, subject to all its laws, both civil and criminal, upon the acceptance of land in severalty, as provided by the act of February 8, 1887, then they are without government or means of government; their political and civil status an anomaly suspended in the air betwen the sovereignty of the state and the sovereignty of the nation.

Contention of the Government that there can be such a thing as qualified citizenship—that is, that it was competent for Congress to confer upon the Indians such citizenship as would entitle them to all the rights of citizens of the state where they were located, and at the same time deny to the state the right to subject them to the same complete and inclusive police control that it may its other citizens, is untenable.

> Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the negroes in this country since their enfranchisement by the fifteenth amendment to the constitution, of which the supreme court, in an opinion written by Mr. Justice Bradley, has said: "When a man has emerged from slavery, by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation

> when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected." Civil Rights Cases, 109 U. S. 25.
>
> In Celestine, 114 Fed. 551-553.

We are entitled to presume that the executive department of the government, before alloting the land in severalty to the Nez Perces, and thereby conferring upon them the rights and corresponding responsibilities of citizenship, had determined that the members of that tribe were sufficiently advanced in civilization to be safely intrusted with the immediate duties and grave responsibilities concomitant with such a status.

In fact, the Nez Perces are perhaps among the most enlightened and intelligent of the Indian tribes.

Even if the reverse were true, Congress was without power under the constitution to renounce the governmnt duty of police control of these people, to break up their tiibal relations, and distribute the mamong the white citizens of Idaho, clothed with all the rights of ordinary citizens and freed from the restriction of government control, and, at the same time, to deny to the state the same full control it has over its other citizens.

The Supreme Court of Kansas, in a recent case, cited with approval by this Court, in re Heff, supra, says:

> Congress, by authorizing the leasing and sale of lands by the allottees with the approval of the secretary of the interior, encouraged the white to go among the Indians and upon their lands, not with the view of benefitting the white man, but with the view of giving to the Indians better environments and developing their lands. We are not to presume that Congress would encourage the white man to go with his family among and upon the lands of the Indian for the benefit of the Indian, and not protect him, his family and his property against the depredations and lawlessness of the Indian, unrestrained other than by the laws of the tribe to which he belongs. * * * * * It is not to be presumed that the rights of citizenship would be conferred upon the allottee for his benefit, and

> he be for a period of twenty-five years exempted from the operation of the laws of the state of which he became a citizen, and, aside from those crimes specifically mentioned in the act of March 3, 1885, be restrained only by a code of laws based upon the primitive ideas and standards of a tribal council. An Indian upon whom has been conferred citizenship and who enjoys the protection of the laws of the state, should be punished for a transgression of them. This we are to presume Congress contemplated.
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> In re Now-goe-Zhuck, 76 Pacific, 877-880.

This reasoning of the Supreme Court of Kansas is peculiarly applicable to the condition of the Nez Perces existing at the time of the allotment, and since developed upon their former reservation.

The Nez Perce reseravtion consisted of over thirty townships, or something like 700,000 acres of land.

The reservation was at this time, and for many years prior thereto has been, surrounded by settled communities. The Indians for years had mingled with the white settlers. Practically all the younger Indians were versed in the English language. Probably a majority of the Indians had adopted the Christian religion, and, as a whole, the tribe was far advanced in civilization.

The topography of the reservation is peculiar. The Clearwater river traverses the reservation in a northeasterly direction for nearly seventy miles. The general elevation above sea level of the valley of the Clearwater is from six to seven hundred feet. Lying west of the Clearwater valley, at an altitude of nearly 3,000 feet above sea level, is a level plateau of prairie lands, having an area of several hundred thousand acres.

The Indians were in actual occupancy only of the river valley. Practically none of the Indians ever lived upon or occupied the high lands.

Upon the taking of allotment in severalty, the Indians selected for their homes the low lands in the valley of the Clearwater and its tributaries. It is true several hundred allotments were taken upon the high prairie lands, but with perhaps less than a score of exceptions, these lands have never been occu-

pied by Indians as homes, but have been leased to the whites. The Indian owners continued to live in the settlements along the river.

Since opening the ceded lands for settlement in November, 1895, practically all of the ceded lands have been located under the homestead and townsite laws, and a large portion thereof has since been conveyed by patent to the settlers without any restriction whatever in the patent against the use and occupation of the land for any purpose.

The white population upon the ceded lands within the former reservation today numbers little less than 10,000 people. There are several towns thereon incorporated under the laws of Idaho, among which are Nezperce, with a population of one thousand; Culdesac, Stites, Kooskia, Peck, Ilo, Mohler, Orofino, Kamiah, Gifford and a number of other towns and villages each having a population of several hundred people.

The upland plateau I have mentioned is now practically a vast grain field of several hundred thousand acres producing annually six or seven million bushels of grain.

Congress must have anticipated such results from the opening of this vast territory to settlement. It is but the repetition of many a like chapter in the history of the settlement of the fertile prairie lands of the west.

It is no longer a question of the government protecting the Indians and feeble frontier settlements of whites from the demoralization and danger of the intoxication of savages.

The motive for establishing saloons upon the reservation is not at all for the purpose of engaging in traffic with the Indians, but for the purpose of furnishing liquors desired by the white settlers for mechanical and medicinal purposes and as a beverage.

It is not a question of regulating commerce among the Indian tribes, for there are no Indians here living in tribal relations, nor even is it to any controlling degree a question of commerce with individual Indian citizens, but it is essentially and pre-eminently a question of regulation of the liquor traffic among the white citizens of the state.

The danger of any encroachment upon the system of inde-

pendent local self-government contemplated by our constitution is well illustrated by the conditions prevailing in the former Nez Perce reservation prior to the decision of in re Heff which has been considered by the state authorities as holding that the state had jurisdiction in the premises.

In every town and even in every little hamlet and cross-road throughout the reservation were men engaged in the illicit sale of intoxicating liquors. The government, from the fact that it has no organized system of local police or constabulary, has been powerless to suppress or even regulate this traffic. In many instances, the men engaged in this traffic were criminals of the worst type, and their places of business, commonly called "boot-legging joints" were the headquarters of gamblers and criminals, and breeding places of vice.

Since the state has assumed jurisdiction over this territory and brought the same within its system of high license control, the boot-legging joint has entirely disappeared, and in its place is the licensed saloon, subject to constant inspection and control by the local police officers of the state, and of the municipality wherin such saloon is located.

Thus, the Indian shares with the white citizen a better and healthier condition of civic life under state control.

I have referred to the history and conditions of the Nez Perces perhaps to an extent that might seem to go beyond the matters shown by the record herein. I am induced to do so because I deem all the matters of fact that I have stated to be matters of history, and general public knowledge within the districts of Idaho, of which the United States courts may take judicial knowledge, and because the considerations I have suggested in connection with the agreement with the Nez Perces, and the various acts of Congress in the premises, show conclusively that it must have been the intention of Congress to terminate the tribal relations with the Nez Perces, and that the effect of all this legislation has been to bring about a state of affairs entirely inconsistent with the idea that the administrative department of this government still retains any such general control over the persons of the Indians as is inconsistent with the intention of Congress to renounce entirely its guardianship over the persons of the Indians.

I could not better illustrate the reverse conditions upon which the earlier decisions are based sustaining the juridiction of the United States over Indians, than by quoting the views of this court expressed in an opinion by Mr. Justice Miller, in a decision sustaining a conviction in the United States Court of an Indian for the crime of murder, wherein the tribal status of the Indian and consequent non-allegiance to the state are clearly made the controlloing consideration.

> Its effect (the status under consideration) is confined to the *acts of an Indian of some tribe,* of a criminal character, committed within the limits of the reservation. It seems to us that this is within the competency of congress.
>
> These *Indian Tribes* are the wards of the Nation. They are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights. *They owe no allegiance to the States and receive from them no protection.*. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by congress, and by the Court wherever the question has arisen."

United States v. Kagama, 118 U. S. 375-385.

The provisions of Section 19, Article 21 of the Constitution of the State of Idaho, providing, in effect, that the jurisdiction of the United States over the lands owned by Indians and Indian tribes should continue only until the Indian title thereto should be extinguished, as expressly ratified by act of congress of June 3, 1890, admitting Idaho as a state, amounting to a compact between the United States and the state of Idaho granting the state exclusive jurisdiction over such Indian reservations for all purposes of police control, *as soon as the title should be extinguished;* and inasmuch as by the subsequent agreement of May 1, 1893, with the Nez Perces, as ratified by act of congress, August 15,

1904, 28 Stats. 332, the Indian title was extinguished, congress was without authority to reserve jurisdiction over the land ceded after the *Indian title had been extinguished*, especially after the title thereto had, as in the case at bar, passed from the United States to citizens of Idaho under the townsite laws, without any restrictions in the government patent.

It will be particularly noticed that there is nothing in this compact between the United States and the state of Idaho that contemplates any such thing as a divided sovereignty. The jurisdiction over lands embraced in the Indian Reservations or belonging to Indian tribes shall remain under the absolute jurisdiction and control of congress *until the Indian title is extinguished*.

There can be no question but that the United States could have retained its absolute jurisdiction for any length of time over these lands so reserved, and that it was entirely optional with the government acting thru its congress to determine when it would release its control over the Indian reservations by the extinguishment of the Indian title. But it was not within the power of congress to turn over to the state of Idaho a partial and divided jurisdiction and sovereignty over these lands. It could not ask or require the state of Idaho to assume the respponsibility of a divided jurisdiction and partial police control. It had authority only to retain absolute jurisdiction and control or by the extinguishment of the Indian title to grant absolute jurisdiction and control to the state of Idaho.

It is conclusively shown by the record, and by facts of which the court will take judicial notice, that the Indian title has been extinguished to the lands included in the former within the said village of Culdesac, and that the same has been granted by the United States to citizens of the state of Idaho without any restrictions.

Upon this point, this Court, in a case involving the construction of similar provisions in the Constitution of the state of Montana, and in the act of congress admitting that state to the Union, has said:

> In February, 1887, by a general law, congress provided for the allotment of lands in severalty to Indians

on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes. 24 Stat. 388. The act in question contemplated the gradual extinction of Indian Reservations and Indian titles by the allotment of such lands to the Indians in severalty. It provided in seciton 6 'that upon the completion of said allotments and the patenting of said lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' But the act at the same time put limitations and restrictions upon the power of the Indians to sell, incumber, or deal with the lands thus to be alloted. * * From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise, where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the *power of the state to frustrate the limitations imposed by the laws of the United States upon the title of lands* once in an Indian Reservation, but which *had become extinct by allottment in severalty*, and in which contingency the *Indians themselves would have passed under the authority and control of the state.*

Draper v. United States, 164, U. S. 240.

And in discussing the act of congress admitting Colorado into the Union as a state, this Court has said:

The act of March 3, 1875, necessarily repeals the provisions of any prior statute or of any existing treaty which are clearly inconsistent therewith. Case of the Cherokee Tobacco, 11, Wall. 616. Whenever, upon the admission of a state into the Union, congress has intended to except out of it an Indian Reservation, or the sole and exclusive jurisdiction over the reservation,

> it has done so by express words. * * * * * * * * *
> The record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indian in their improvements, or the regulation by congress of the alienation and descent of property and the government and internal police of the Indians.
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> United States v. McBratney, 104, U. S. 621-624.

Applying the principles declared by this court in Draper vs. United States, and in United States vs. McBartney, supra, to the question of jurisdiction of the United States over lands ceded by the Nez Perces, the jurisdiction of the United States would be limited to the protection of the lands allotted from alienation or encumbrance, and incidentally, perhaps, the protection of the improvements upon said lands, for, as suggested in Draper vs. United States, the Indians themselves, by act of taking allotments in severalty under the provisions of the law of 1887, have passed under the authority and control of the state, and are subject to its laws, both civil and criminal, and therefore, crimes committed by or against Indians are to be punished the same as crimes committed by or against the white citizens, and all questions of the government and internal police of the Indians become inapplicable, as such functions cannot properly be exercised by the United States over citizens of the state in their intercourse and commerce with each other within the state.

The United States v. Rickert, 188, U. S. 432, is clearly distinguished by this court in re Heff, in as far as it had relation to the issues in the case at bar. What is said therein in reference to the Indians being wards of the government, when read in the light of the entire decision, only goes to the extent of a special guardianship for the purpose of protecting the lands allotted and the personal property given the Indians by the government to aid them in adopting the ways of civilization. There is nothing in that decision that suggests that the government retains any control over the person of the Indians after they become citizens. It is with this latter question, and not with the property rights of Indians, that the case at bar has to do.. In this case the introduction of the liquor was not upon an Indian allottment, but upon lands admitted to be owned in fee by white citizens of Idaho.

The theory upon which the plaintiff in error was tried and convicted is clearly shown by the opinion of the Honorable District Judge overruling the demurrer to the jurisdiction of the Court, and in the instructions to the jury.

The opinion in no wise suggests that a clear issue of law is not presented challenging the jurisdiction of the Court, and upholds the indictment and retains jurisdiction solely upon the grounds that the *entire* former Nez Perce Reservation is still Indian country, and that *all* the Nez Perce Indians are still wards of the government and not citizens, notwithstanding, it is conceded that they have received allottments in severalty. (Transcript, page 26.)

> "It leaves *the entire Reservation and all the Indian allottees* thereof for 25 years from May 1, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these *provisions of the act of* 1887 *are not applicable to the Nez Perce Indians and that they are neither citizens nor subject to the laws of the state, but are* still the wards of the nation at least so far as concerns the laws regulating the sale of intoxicants."

The entire instruction given to the jury was as follows, (Transcript, page 17.)

> Gentlemen: The only instruction I need to give you is this: If you find that the defendant had this bottle of whiskey upon him *within the limits of what is known as Nez Perce Indian Reservation*, then you are to find him guilty of this charge. The charge, of course, is for *introducing liquor into the reservation*, but I instruct you that having it in his possession upon the reservation *is conclusive*. When and where he bought it is immaterial; that it was in his possession within the limits of the Indian reservation is sufficient. *I instruct you as a matter of fact, that Culdesac is within the limits of the reservation.*"

The opinion of the learned District Judge, as well as the instructions to the jury, not only settles the question that the *locus in quo* of the alleged offense charged in the indictment, as well as the facts of the transactions relied upon to support the jurisriction of the court are and were conceded by the government at every step of the proceeding to be, as we have herein contended; but it does more, we are brought face to face with the startling proposition that the *act of* 1887 *is not applicable to the Nez Perce Indians* and that they are *neither citizens nor subject to the laws of the state.*

Not subject to t he laws of the state! Then to what laws are they subject? The tribal community has been disolved, the government no longer maintains any machinery to police the reservation; the Indians are left free to roam at will; ten thousand white settlers, at the invitation of the government, have settled upon the former reservation. Where, if not in the state, is vested the jurisdiction and the power to protect the family and property of those citizens of Idaho?

But to summarize the charge of the Court. The jury is told that "the charge—of course, is for *introducing liquor* upon the reservation, but I instruct you that having it in his *possession* upon the reservation is *conclusive.*"

Applying the doctrine of the learned District Judge to the ten thousand white settlers within the former reservation, each and every one of them who may have a half pint of wine or brandy in their possession, whether it is for medical or household use, or for however needful, innocent, or lawful purpose, is *conclusively presumed* to be *guilty*, and may be sent to the penitentiary.

The conclusion to which this contention leads is an efficient demonstration of the fallacy of the government's provision tha. ..agress intended the act of 1897, 29 Stat. L. 506, under which petitioner is imprisoned, to apply to the lands patented to white settlers. It certainly is a striking illustration of the confusion and anomoly to which a divided sovereignity in matters of police control may lead.

The government contends that the United States has juridiction, because of a clause in the treaty or agreement with the Nez Perce Indians ratified on the 3rd day of May, 1893, providing in substance that the laws of the United

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States prohibiting the introduction of liquor into the Indian country shall remain in force over the land ceded for a period of twenty-five years.

This position seems to me to be entirely untenable. The commissioners who concluded that agreement were appointed pursuant to the act of February 28, 1887, 24 stat. L. 388 and under that statute were given no power whatever to insert such a provision in the agreement with the Indians. It was contemplated under the very act under which the negotiations was authorized that the purpose of the negotiation should be to bring about the dissolution of the tribal relations of the Nez Perce Indians by allotting them lands in severalty, by the acceptance of which, under the terms of said act, they were to become citizens of the United States and subject to the laws of the state of Idaho both civil and criminal. It was contrary to the purpose and spirit of this act, as well as to the policy of the government, that any restrictions should be placed either upon the responsibility of the Indians to the state, or upon the control of the state over the Indians after the acceptance by them of their land in severalty.

Indeed Congress was without ~~conditional~~ Constitutional authority to authorize such an agrement with the Indians or to ratify the clause in question. The effect of such an agreement would be to establish a divided sovereignty of certain definite territory and deprive the state of full police control of its own citizens within its own territory. It would seem, further, that in so far as it attempted to provide for the future police control of the territory ceded, that the clause is void for the additional reason, that it amounts to the government bartering with its own citizens to place a limitation upon its future policy in regard to matters of mere police regulation.

Boyd vs. Alabama, 94 U. S. 650.

New York & N. E. E. vs. Bristol, 151 U. S. 567.

Holden vs. Hardy, 169 U. S. 392.

Nor can the clause in the treaty relating to intoxicating liquors be considered as a contract at all. Upon the ratification of the agreement the tribal relations of the Nez Perces were to be dissolved. The entity of the tribe was destroyed by its very terms.

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The agrement was concluded with the Nez Perces May 1st, 1893, long after Idaho had been admitted as a state as I have hereinbefore considered the effect of the ratification of the constitution of the state of Idaho, and the admission of the state as amounting to a compact between the United States and the state of Idaho, that jurisdiction over Indian lands should be retained by the United States only until the Indian title should be extinguished. And was suggested that Congress could ask not or require the state of Idaho to assume the responsibility of a divided jurisdiction and partial control over Indian lands or Indian reservation within the state. Under the admission act the government could retain absolute jurisdiction or control, or by extinguishing the Indian title, grant absolute jurisdiction and control to the state.

I understand that the government substantially concedes that to give effect to the clause in the agreement with the Nez Perces relating to intoxicating liquors, would divide the sovereignty for the purpose of police control over the territory embraced in the Nez Perce reservation between the state and Federal governments, but argues that it is within the power of Congress to do this, and that the decision of this count in the matter of Heff is not controlling.

We understand the decision of this court In re Huff, supra, to be explicit upon the point that there can be no exception to the rule; that a divided sovereignty for the purpose of police control is an impossibility under our system of government. This court in its decision, pages 506 and 507, In re Huff, supra, states the reason for this rule and cites The Kansas Indians, 5 Wall., 537, holding the Indians must be wholly subject to the United States until clothed with the rights and bound by all the duties of citizens, and United States vs. Dewell, 9 Wall., 41, holding that a police regulation embraced in an act of Congress can only have effect where the legislative authority of Congress excludes territorially all state legislation.

In the last analysis the one vital question at issue in the case at bar is: Can a divided soverignty for the purpose of police control exist under our system of government. We understood this question to have been absolutely settled by this Court in the matter of Heff. An examination of the brief of the Honorable Solicitor General in the matter of Heff, as well

as the decision of the Court therein, shows that all the considerations now urged by the government in favor of qualified citizenship or a divided sovereignty. were substantially urged in the former case, and explicitly passed upon adversely to the government's position. I do not understand that any new doctrine was enunciated by this court in the Heff case, but if there are any decisions of this court holding contrary thereto, certainly those decisions must be considered as overruled or distinguished in as far as they may be urged as precedents for upholding the constitutionality of any law attempting to provide for a qualified citizenship or a divided sovereignty.

Respectfully submitted.

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